Supreme Court, U.S.
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No 05-860

IN THE

Supreme Court of the United States

PETER J. MUTNICK, OTHERS – Petitioner(s)

VS.

CITY OF BERKELEY, ET AL. – Respondents

On Petition For Writ of Certiorari To
The Superior Court of the State of California
For the County of Alameda

PETITION FOR WRIT OF CERTIORARI

Peter J. Mutnick, Pro Se
2227 Derby Street, Apt. 3
Berkeley, California
94705 | 510-540-7401
pjmutnick@sbcglobal.net

QUESTIONS PRESENTED

Primary Question:

If a state trial court denies a third-party motion for lack of jurisdiction because a supposedly exclusive procedure was not followed and then rules on the merits of the motion albeit in dicta after it is *functus officio* to do so, does that constitute a denial of due process under the Fourteenth Amendment, insofar as the improper part of the ruling was intended to and very likely had the effect of persuading the appellate courts that the jurisdictional issue was not worth considering since the motion was presumably without merit in the first place?

Related Questions:

If the holding and the dicta of the trial court were both untenable under state law and if the effect of the judgment was to deprive over 100,000 citizens of participation via speech, press, assembly, and petition in the most important decision their city will face for the next fifteen years, do any of these circumstances bear on the first question or otherwise violate due process under the Fourteenth Amendment?

If it had already been established as the law of the case by the ruling of the court on an earlier motion by another would be third-party that the procedure deemed exclusive by the trial court in the present motion was in fact not permitted under state law, does that violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment?

Do all of these prejudicial irregularities, if proven to exist, constitute not only a miscarriage of justice, but a mass of confusion that should excuse any resulting confusion in the attempts of a "pro se" litigant to seek justice in this matter?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CITY OF BERKELEY, a municipal corporation, Petitioner / Plaintiff;

UNIVERSITY OF CALIFORNIA, BERKELEY; REGENTS OF THE UNIVERSITY OF CALIFORNIA; and DOES 1 THROUGH 50, inclusive, Respondents / Defendants;

CARL FRIBERG, and OTHERS, Third Party, Proposed Intervenor – Intervenor status denied – not presently a party to the case;

PETER J. MUTNICK, and OTHERS, Third Party, Proposer of Inquiry Into the Existence of Extrinsic Fraud in the Obtaining of the Voluntary Dismissal In This Case, with intent to intervene upon proof of the fraud.

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THE CONUNDRUM

It has been said that law is too important to be left to
lawyers and in matters having to do with rights of
participatory democracy, this is especially true,
for representatives are not kings for a season,
and autocratic behavior borders on treason.

If

We the People
Do not really know
What rights are bestowed
Upon us, if we do not know how
To cherish, defend, and protect them
Then how can we even truly possess them
Or exercise them or feel free to express them?

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The highest state court decided my case on October 12, 2005. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.(a) and the interpretation thereof found in the following widely cited authority:

> *Crowell v. Randell,* 35 U.S. 368, 392 (1836):
>
> And here the doctrine of the court has been, that it is not indispensable that it should appear on the record, in totidem verbis, or by direct and positive statements, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to [the completeness or totality of] the judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States – Preamble; Article VI, Paragraph 2; 1st Amendment; 14th Amendment, Section 1.

Preamble:
We the People *of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.*

Supremacy Clause:
This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Amendment I:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV, Section 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of California – Article 1, Sections 2.(a) and 3.(a)-(b).

Article 1, Section 2:

(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Article 1, Section 3:

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.
(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

[Part (b) added by amendment in 2004 by Proposition 59.]

United States Code – Title 28, Sections 1257.(a), 2106:

§1257.(a): Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

§2106. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Ralph M. Brown Act, California Government Code – §54950, 54953.(a), 54954.3, 54956.9, 54957.1.(a)(3), 54959:

§54950. In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

§54953.(a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

§54954.3.(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, ...

(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but n t limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

§54956.9. Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation *when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.*

For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter.

[Emphasis added.]

[This code section now goes on to define "litigation" and when it is "pending" for the purposes of this chapter.]

§54957.1.(a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:...
(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:...
(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.

§54959. Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.

California Evidence Code – Sections 1152.(a), 1154:

§1152.(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

§1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

STATEMENT OF THE CASE

1. Introduction (Including Jurisdiction)

(In continuation from the Questions Presented page – page i.)

The primary question presented, by itself, might be too insubstantial to concern this Court. However, the first related question lends *gravitas* to the primary question and all the questions taken together suggest more than just an isolated instance of an inconsequential denial of due process. What we have here is nothing less than a pattern of denial that constitutes in its entirety a complete miscarriage of justice. That the United States should come to the aid of its citizens when they are confronted by a conspiracy of bureaucratic state interests is strongly suggested by the Privileges or Immunities Clause of the Fourteenth Amendment, once it is freed from the death grasp of the *Slaughter-House Cases,* 83 U.S. 36 (1873), which was arguably intended to undermine not only the advance in civil rights that had just occurred but the essential character of the Republic itself, as envisioned by its Founding Father. The critical question of interpretation here is whether the term "United States" in the Privileges or Immunities Clause refers to an alienable sphere of influence or the special guardian of the sphere of inalienable rights. The following from the Founding Father resolves that question from his perspective, which was also the perspective of the Framers of the Fourteenth Amendment.

George Washington, Farewell Address, Philadelphia, September 17, 1796:

"The unity of government which constitutes you one people is also now near to you. It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad, of your safety, of your prosperity, of that very liberty which you so highly

prize. But as it is easy to foresee that from different causes and from different quarters much pains will be taken, many artifices employed, to weaken in your minds the conviction of this truth, as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment that you should properly estimate the immense value of your national union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think and speak of it as the palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event be abandoned, and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest or to enfeeble the sacred ties which now link together the various parts. ...

"...and remember especially that for the efficient management of your common interests in a country so extensive as ours a government of as much vigor as is consistent with the perfect security of liberty is indispensable. *Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian.*" [Emphasis added.]

This stands in stark contrast to the role that the *Slaughter-House Cases* would assign to the federal government, and the two visions cannot be regarded as anything but opposites, one extolling the virtues of the central order and the other extolling the virtues of unlimited police power exercised by the state and unchecked by a central order. *Slaughter-House Cases*, 83 U.S. 36, at 62 and 74, would leave the citizen helpless with respect to abuses of the police power, whereas the Founders intended that the federal Court would exercise a check on such abuses in the name of the central order.

In this case, all the facts necessary to resolve the primary question and most of the facts necessary to resolve the second related question appear on the face of the record. The second related question and especially the first related question require some deeper digging into the record and into matters of state law. Can such an intrusion be justified? To what degree did we press a federal question below, and to what degree can that justify an intrusion into state matters?

Much of the caselaw on the "pressed or passed upon below rule" seems irrational and not firmly based on the original meaning of the doctrine. The misdirected aim is to afford to the state courts a comity at all costs that is inimical to justice. In *Illinois v. Gates,* 462 U.S. 213 (1983), the rule was not regarded as jurisdictional. Its prudential justifications were considered. The lead case cited was *Crowell v. Randell,* 35 U.S. 368 (1836). That case does **not** require that the federal question be raised "in totidem verbis, or by direct and positive statements." It is sufficient, according to *Crowell,* that the question be raised "by just and necessary inference," i.e. by logical inference. (See *Crowell, supra,* at 392.)

We stated the following in our Petition for Writs of Mandate and Certiorari, in the state Court of Appeal, on page 11: "We had a legal right to know what settlement offers were being considered so that we could exercise our right to participate in a participatory democracy. That right is granted to us by the Brown Act, but is ultimately a Constitutional right and a natural right."

Knowing our own thoughts, we can assure the Court that we intended by this statement to refer to the federal Constitution, because we view the natural or inalienable rights as coming from God, as stated in the Declaration of Independence, and we view the United States, one nation under God, as the special guardian of those inalienable rights, as stated in the Farewell Address of George Washington.

Moreover, in all the essential respects that concern us here, there is no difference between the California Constitution and the Constitution of the United States. With respect to the four political freedoms of the First Amendment the provisions are virtually identical, the state Constitution having been clearly modeled after the federal Constitution. The California Constitution goes further by including a right of access to government information in a participatory democracy, but this was already the strong belief of the greatest federalist: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." (9 Writings of James Madison 103 (G. Hunt ed. 1910).)

Therefore, even if the state courts mistook our intention and thought that we were referring only to the state Constitution in our reference to rights to know and to participate, they were not thereby prejudiced, because the state requirements are exactly the same as the federal requirements and if anything stronger.

In the context of the case, "exercise our right to participate in a participatory democracy" most clearly implicates the four political freedoms of the First Amendment by "just and necessary inference," for that is how we would participate.

The state courts were not prejudiced for another reason by any lack of explicitness in our raising of the federal issue. The very independence of the state issue, which might imply a lack of jurisdiction, from the contrary prudential premise demonstrates a lack of prejudice. The state ruling on the state issue of access to information would have been the same regardless of whether the state courts considered the consequential federal issue of political rights of expression.

We actually raised federal issues throughout our Motion, and one of the best examples is in our Memorandum of Points and Authorities in the Trial Court, right on page 1: "It is both implicit and explicit that Plaintiff/Petitioner brought its claim on behalf of the public or citizenry of Berkeley. No government in our democracy has any authority to act other than that which comes from the people. (*U.S. Term Limits v. Thornton,* 514 U.S. 779, 821 (1995).)"

In our Memorandum of Points and Authorities, we said on page 9: "The fraudulent act resulted in collusion between the parties to the exclusion and detriment of the citizens of the City of Berkeley. The settlement agreement violates the City Charter by giving away the power to control the destiny of the City to the University, while getting nothing in return. This is a classic example of the type of situation described in *United States v. Throckmorton,* 98 U.S. 61, 66 (1878):

> [W]here an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side; these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

Finally, we said on page 10: "The information the people are entitled to is for the purpose of retaining control over their elected representatives and compelling them to truly represent the people. The representatives of the people are not to conduct themselves autocratically, for that is the death of democratic institutions. A fraudulent act that excludes the people from 'the people's business' is perhaps the most odious form of extrinsic fraud imaginable."

2. The Unbearable Relevance of *Bush v. Gore*

Bush v. Gore, 531 U.S. 98 (2000), is very relevant to this matter for two reasons: (1) it considers the justification for intervention in state matters; and (2) it considers the tone and tenor of our times in relation to the trust or lack thereof that people at large have or should have in the courts. I will find a friend in the concurring opinion of Justice Rehnquist, but suggest that he didn't go far enough, and I will take issue with the dissent of Justice Stevens. In other dissents, Justice Stevens has championed the citizen against the bureaucracy, as in *Houchins v. KQED, Inc.*, 438 U.S. 1, at 31 (1978), and although in *Bush v. Gore* he saw a danger in the federal Court overstepping its authority, the danger of bureaucratic response at the state level should never be underestimated. In lower profile cases, it happens all the time and requires intervention on occasion by a federal Court that accepts its mission as the ultimate guardian of inalienable rights.

BUSH ET AL. v. GORE ET AL., 531 U.S. 98 (2000):

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring, 114-115:

"For example, in *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449 (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioner had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id.,* at 456. ...

"Six years later we decided *Bouie* v. *City of Columbia, 378* U. S. 347 (1964), in which the state court had held, contrary

to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon NAACP, we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U. S., at 361-362. What we would do in the present case is precisely parallel: hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.1

"This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

"1 Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas v. South Carolina Coastal Council,* 505 U. S. 1003 (1992)."

All of the cases mentioned here are apposite to our case. In *NAACP,* the procedure deemed exclusive was not downright wrong, whereas in our case it was, which means that the principle applied in that case applies *a fortiori* in our case. Similar to *Bouie,* in our case the meaning of a statute was impermissibly narrowed to make of no effect a requirement of openness that was apparent on the face of the statutes.

The impermissible narrowing was contrary to an explicit constitutional guideline of interpretation that had just been adopted by the people of California in 2004 (Proposition 59). This again means that the principle applied in *Bouie* applies *a fortiori* in our case. *Lucas* is analogous to our case, if one substitutes the political freedoms of the First Amendment for rights under the Takings Clause and the right of access to information for property rights under state law. As in *Lucas*, if there is no right to the information upon which the political freedoms depend in a certain situation, then there is no abridgement of those rights, but an inquiry into that premise is therefore mandated.

The one place where I feel that Justice Rehnquist does not go far enough is in the statement, "This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*." In the place of this statement, the following statement should be considered: "This inquiry does not imply a disrespect for state *courts* but rather a respect for state *legislatures*." Why the unequal treatment of courts and legislatures? Is there anything in the Constitution that can justify the comity normally accorded to the courts and thereby denied to the legislatures and especially to the people? Each state is not one monolithic entity, and the people are the true sovereign.

The presumption of the dignity and impartiality of the courts can be jeopardized, for instance, if one party controls the Legislature and another party controls the courts. In that case, there is likely to be a political tension between the two and a tug of war with respect to the enforcement of the laws that the Legislature or the people adopt. In Berkeley, the party controlling the Legislature betrays its own purpose. It applies the laws hypocritically and unevenly, if at all, showing favoritism as a matter of course. The average citizen is caught in the crossfire of all these political shenanigans and the people are deprived of their sovereignty.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting, 128-129:

"What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by to day's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

If it is true that *Bush v. Gore* burst the bubble of the pretense of justice, then in my humble opinion it performed the greatest of services to the Republic. It should *not* be taken for granted that judges are impartial, for that assures they will *not* be. "Eternal vigilance is the price of liberty." (Wendell Phillips, 1852.) If judges were all impartial and capable, there would be no need for appellate review at all. So, yes, we are asserting a complete lack of confidence in the judges who have heard our case. We do not think justice has been done, but on the contrary we are certain that it has been suppressed. I am not trying to excuse my own mistakes as a "pro se" litigant, but I am certain that rather than receiving a modicum of deference for my lack of professional skill, I have on the contrary been faced with a presumption that any claim I bring is meritless. There has not been a desire or an attempt on the part of the judges to do justice or discover the truth of the matter that has been presented for adjudication.

3. Our Right of Access to Information Under the Brown Act

The right of access to information that we are concerned with in this matter fills the void referred to in the following: "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. ...[T]he Constitution affords no guidelines, *absent statutory standards.*" [Emphasis added] (*Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).)

In his dissenting opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1, at 31 (1978) and later in his concurring opinion in *Press-Enterprise v. Superior Court*, 478 U.S. 1, at 19 (1986), Justice Stevens tried to find a fundamental right of access to information in the First Amendment itself, apparently on the grounds that informed freedom of speech or of the press must be predicated on access to information. Here that logical inference is not necessary because the right has been very well established by the Ralph M. Brown Act (California Government Code Sections 54950-54963) and the California Constitution, Article 1, Section 3, part (b) of which was added by Referendum in 2004. This established right should satisfy the local custom requirement for a qualified right of access under federal law as established by *Press-Enterprise, supra,* even if the established right has not been properly enforced by the state courts.

4. The Facts of the Case

Petitioner is a citizen of the United States by birth and a long-time resident of Berkeley, California. Hence, he is a citizen of the State of California according to the Citizenship Clause of the Fourteenth Amendment.

Respondents are public entities of the State of California. The City of Berkeley is a municipal corporation and a

political subdivision of the State that has no sovereign immunity under the Eleventh Amendment or under common law. (U.S.C.A. Const. Amend. 11, Note 96.) The University of California has been ruled an "arm of the State," and hence it does have sovereign immunity. (U.S.C.A. Const. Amend. 11, Note 117.) However, this is not a suit for damages, but to restrain illegal and unconstitutional acts of public officials. "This [eleventh] amendment is no bar to suit against state officials to restrain unconstitutional acts undertaken in their official capacities; the law recognizes the right of an interested party to force state officials to act in accordance with the Constitution. *Jordan v. Gillian,* C.A. Ohio 1974, 500 F.2d 701." (U.S.C.A. Const. Amend. 11, Note 92.)

Both Respondents are state actors and all of their actions are subject to scrutiny under the Fourteenth Amendment. *"No state shall make any law which shall abridge" means "No state actor, including the state courts, shall take any binding action under the authority of the state which shall abridge."* (U.S.C.A. Const. Amend. 14, §1, Note 20|Amend. 1, Note 7.)

Petitioner filed a motion in the Superior Court of California for the County of Alameda on June 22, 2005. The motion was heard by the designated CEQA Judge, Bonnie Lewman Sabraw, in Department 512, in the Hayward Hall of Justice.

The motion was for inquiry into the existence of extrinsic fraud in the obtaining of the voluntary dismissal in the underlying case known as *City of Berkeley vs. University of California, Berkeley,* RG05199505. In that case the City of Berkeley had filed a Petition for Writ of Mandate against the University of California to challenge its approval under the California Environmental Quality Act (CEQA) of its 2020 Long Range Development Plan (LRDP). After extensive settlement negotiations, kept secret by a "Confidentiality Agreement," the City of Berkeley obtained a voluntary dismissal pursuant to an unmediated settlement.

Petitioner alleged in his motion that he and all other citizens of the City of Berkeley had been unlawfully excluded by an actual extrinsic fraud both from participation in the settlement process and from the case itself as potential interveners. The alleged illegality was based on a self-evident conjunctive construction of California Government Code Sections 54953.(a) and 54956.9 together with California Evidence Code Sections 1152 and 1154.

The argument is simply that Section 54953.(a) requires all meetings of the legislative body of a local agency to be open except as otherwise provided in the Brown Act itself. Section 54956.9 provides the allowable exceptions pertaining to meetings of the legislative body with its legal counsel to discuss pending litigation. That section applies only "when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." However, Evidence Code Sections 1152 and 1154 provide that settlement offers and settlement negotiations can never be admissible in the litigation to establish either the validity or invalidity of a claim. Therefore, the discussion in open session concerning those matters, insofar as it is limited to a discussion of what occurred in the settlement negotiations, could never prejudice the position of the local agency in the litigation. Therefore, the exception does not apply and the discussion involving only what occurred in the settlement negotiations between the parties, as opposed to any further discussion involving legal analysis and weighing of options, was required to take place in public open session meetings.

Article 1, Section 3.(b)(2) of the California Constitution provides that: "A statute ... shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." Therefore, there was no escaping the obligation to separate the discussion that was not excepted from the discussion that was excepted and to hold the former in regular open session meetings. That was

entirely practicable, since closed session meetings were often scheduled directly after open session meetings.

The deliberateness or actualness of the extrinsic fraud was confirmed by a public statement of the Berkeley City Attorney during a public discussion just prior to a special closed meeting of the Berkeley City Council on May 17, 2005 and by the Confidentiality Agreement itself, which was transparently pretextual and designed only to exclude the public in violation of the Brown Act.

The trial court denied the motion in a written decision that was untenable and comprised of plain error in all respects. The Court of Appeal and the Supreme Court summarily denied petitions for writs seeking to overthrow the decision, even though it was as wrong as a decision can possibly be.

Petitioner was beneficially interested in the underlying lawsuit as one of those citizens whose interests the City of Berkeley sought to protect by filing its Petition, according to numerous statements contained within the Petition itself. (Paragraphs 16, 23, 35, 58, 59, 61, and 63 of the City of Berkeley's Petition for Writ of Mandate.)

Petitioner also played a special role in bringing to the attention of the Berkeley City Council its violations of the Brown Act in a public comment session just before the City Council went into closed session and approved the disputed settlement of its case with the University of California on May 24, 2005. Prior to that, Petitioner had e-mailed all members of the City Council concerning the violations.

5. <u>The Actual Fraud and the Confidentiality Agreement</u>

The rationale for the secrecy was stated by the City Attorney as follows (see Appendix H):

> The confidentiality agreement was actually signed at the City's request, because the City has in the past had situations where during the pendency of a lawsuit comments are made or settlement discussions occur and then those discussions and comments are used in the litigation against the City.

It strains credulity that any City Attorney could be so ignorant of the law. Rather, one must conclude that this was part of a conspiracy to deceive the public, whom the City Attorney could assume would not be familiar with the law. This is made very clear by the Confidentiality Agreement itself, where the above concern is stated in Section 1, *along with a mention of Evidence Code Sections 1152 and 1154.* Again, it is inconceivable that well-educated attorneys could not realize that they were standing these Code Sections on their head by deriving a justification for secrecy from them, especially in light of the Brown Act and the recently added provision of the California Constitution pertaining to it, which were well-known to the attorneys. Rather, Section 1 of the Confidentiality Agreement was clearly a subterfuge for Section 2 of the Confidentiality Agreement, which disclosed its real and unlawful purpose (see Appendix G):

> Both Parties hereby agree that they will not disclose any of the information or documents exchanged during settlement negotiations outside the context of settlement of this Litigation. The Parties agree that to the extent allowed by law, the information discussed or exchanged during settlement discussions will not be disclosed publicly.

This is clearly self-conscious subterfuge, because these two sentences are incompatible. The City Attorney knew full well that the secrecy was not allowed to any extent, and yet she attempted to befuddle the masses into accepting a deprivation of their rights under the law.

6. The Untenable Wrongness of the Trial Court's Ruling

As has been suggested on the Questions Presented page, the Trial Court denied the Motion for lack of jurisdiction and then ruled in dicta on the merits of the Motion after it was *functus officio* to do so.

a. Denial for Lack of Jurisdiction

The Trial Court denied the Motion for lack of jurisdiction solely because a supposedly exclusive procedure was not followed, namely the motion for inquiry into fraud was not part of a motion to vacate the judgment. The Trial Court badly misconstrued the caselaw that it cited and relied on and the whole concept that is involved in a manner so blatant and bizarre that the error seems to have been either deliberate or a symptom of gross incompetence. The procedure that it ruled to be exclusive is only the "recognized method" in cases involving judicial judgments, which are subject to appeal or at least to a writ of certiorari. A voluntary dismissal is a ministerial act that is subject to neither and is moreover "absolute," according to well-settled caselaw in California, by which it is meant that it is impervious to challenges from other parties or from the court itself. The dismissing party can move to set aside its own voluntary dismissal, on certain grounds, but that is the only exception.

The Trial Court relied on *Gardner v. Trevaskis* (1958) 158 Cal.App.2d 410, 413-414. *Gardner,* at 413, relies on *Elliott v. Superior Court* (1904) 144 Cal. 501, and *Elliot* at 509 makes clear that the judgment or order must be "appealable," and goes on to say, "In case of an order or judgment in excess of jurisdiction but not appealable, and therefore reviewable only upon certiorari, the remedy could be made available to any stranger to the record injuriously affected, by a resort to the same method of moving to set it aside, and thereby making himself a party."

This makes perfectly clear, although it should be obvious, that the "recognized method" for making oneself a party depends on the susceptibility of the underlying judgment to the procedure that is followed, since the goal is to achieve an appeal of the judgment. If the judgment is not subject to appeal or at least to a writ, then the "recognized method" obviously cannot work.

There is another line of authorities, which Petitioner relied on in the Motion, that *does* apply to voluntary dismissals. The lead case involved a voluntary dismissal. It is *King v. Superior Court* (1936) 12 Cal.App.2d 501, 511, 514, with emphasis added:

> In the instant case the defendant did not choose to follow the usual and ordinary procedure but invoked the inherent power of the court to protect the sanctity of its judgment against extrinsic fraud by means of a motion. It is established that a court has such power. (*McGuinness v. Superior Court, supra.*)
>
> We conceive the correct rule to be applied to cases of this kind is, that a court has inherent power and jurisdiction to vacate, on motion, an order or judgment obtained by extrinsic fraud, but if such fraud is not proved it must be held to have exceeded its jurisdiction in vacating an order or judgment. Upon **a proper application** being filed it had the power to inquire into the existence of extrinsic fraud....

The Trial Court rejected the parties' claim that it could not reopen the case, and apparently relied at least in part on its own misconstruction of this passage. It took "a proper application" to mean a motion to vacate the judgment, but that would be inconsistent with all the other caselaw, as I have already explained. *King* itself clearly resolves the

matter in favor of the reading of Petitioner and in flat denial of the contrived and false reading of the Trial Court. *King v. Superior Court* (1936) 12 Cal.App.2d 501, at 512:

> The rule in such cases may thus be stated: When jurisdiction to inquire and act depends upon the existence of certain facts, the absence of proof of such facts limits the power to that of inquiry only, and if action is attempted it is in excess of jurisdiction.

If all this wasn't-bad enough, it gets worse. The Ruling of the Trial Court was in diametrical contradiction to a prior Ruling by the Law and Motion Judge, James A. Richman, on a similar motion in the very same case brought by another would-be third party, Carl Friberg. In that Ruling, which was established as the law of the case, the Judge cited *O'Dell v. Freightliner Corp.* (1992) 10 Cal.App.4th 645 for the correct proposition that, "This action was dismissed in its entirety with prejudice on May 26, 2005, precluding intervention by Mr. Friberg." *O'Dell* states, at 660:

> RLC's reliance on *Carden v. Otto*, supra, 37 Cal.App.3d 887, also is misplaced. ... the employer in *Carden* appealed the denial of a motion to vacate a judgment whereas RLC seeks to set aside a dismissal. Although this distinction might appear to be one grounded solely in procedure, it is not. A judgment, like a proposed settlement, is not final. It has not yet been satisfied. Dismissal of an action, like satisfaction of a judgment, brings a finality to the litigation which renders further discussion of the matter academic. The settlement money has been disbursed. The lawsuit is over.
>
> RLC's only remedy at this point is a new action. In *Carden* ... the judgment had been entered but had

> not been satisfied. Unlike Code of Civil Procedure section 473 which limits relief to parties or their legal representatives, an appeal from a judgment may be taken by "[a]ny party aggrieved ...." (Code Civ. Proc., § 902.) A person not a party to the action as originally commenced or tried may become a party to the record, subsequent to the judgment, by moving to vacate and thereby gain a right of appeal from the order denying the motion. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 113, p. 130, § 136, p. 146; *Morton Regent Enterprises, Inc. v. Leadtec California, Inc.* (1977) 74 Cal.App.3d 842, 847 [141 Cal.Rptr. 706]; *Ryerson v. Riverside Cement Co.* (1968) 266 Cal.App.2d 789, 795 [72 Cal.Rptr. 595].)
>
> Thus, once a case is voluntarily dismissed after settlement or a judgment has been satisfied, the option of returning to the status quo ante at the behest of a nonparty employer or employee is no longer available.

This prior Ruling is obviously correct, and without following the method prescribed in *King,* when the dismissal was obtained by extrinsic fraud, there is no other way of challenging a voluntary dismissal. The prior motion was not res judicata or collateral estoppel, because it was denied on procedural grounds without reaching the somewhat different merits of the motion. Moreover, it was ex parte. Petitioner followed a different procedure, the only procedure that can be followed in such a situation. The Trial Court denied what was true and did so on grounds that were patently false.

b. <u>The Subsequent "Ruling on the Merits"</u>

The "Ruling on the Merits" never addressed or answered in any way the substance of the Motion that was presented to

the Trial Court. Instead, it threw up a slew of inapposite arguments amounting to a bizarre onslaught of judicial advocacy. The gist of the arguments was that (1) Petitioner could have taken action sooner than he did and therefore was not defrauded, and (2) a section of the Brown Act pertaining to final approvals of settlement offers is decisive as to whether the settlement offers themselves had to be released to the public at an earlier stage of the settlement negotiations. These arguments were fed to the Trial Court by the parties and are not only inapposite, but blatantly false.

Neither Petitioner nor any other interested citizen of Berkeley could have intervened sooner because the City of Berkeley was adequately representing their interests, based on the only information that was available, namely the City's Petition for Writ of Mandate. That fact precluded intervention under California law. Intervention can only be granted when it can be demonstrated by the potential intervener that his interests in intervention outweigh the inconvenience to the existing parties and the court. (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d. 299, 303.) That can never happen so long as the potential intervener has no definite reason to believe, much less proof, that his interests are not being adequately represented. Having a mere suspicion that they may not be, due to the secrecy of the settlement negotiations, did not amount to a cause of action in intervention.

It is true that we could have brought an action under the Brown Act, but the violation of the Brown Act only became apparent on May 17, 2005, when the City Attorney explained in public at a City Council meeting her justification for the secrecy. Petitioner knew enough of the law, in particular Sections 1152 and 1154 of the Evidence Code, to know that her explanation made no sense at all. Immediately upon this realization, Petitioner did all he could do to alert the City Council to its violations of the Brown Act and to take legal action as soon as he discovered what action could be taken.

The Trial Court asserted furthermore that since Petitioner could have brought a CEQA action himself against the University of California, he was not defrauded out of a right of intervention in the City's lawsuit. The illogic of this argument is just staggering. Suffice it to say, apart from the illogic of the argument, that Petitioner did not have the wherewithal to pursue the whole matter single-handedly or in concert with others. He relied on his City to do that and that is what Cities are for. Once the City filed its lawsuit it was obliged to proceed lawfully in its execution. The City did not do the citizens a favor by representing their interests in the first place – it was constitutionally obligated to represent their interests. This is of course self-evident to anyone who actually believes in our system of government, which is representative democracy.

Government Code Section 54957.1 pertains to the reporting of final approvals of settlement offers. Its reference to Section 54956.9, the section that provides an exception to the sunshine requirement, is only to the definitions of pending litigation contained therein. It does not purport to substitute for the substantive provisions of that Code Section. It refers only to the final approval and the wording makes that clear: "the local agency shall disclose the fact of that approval, and identify the substance of the agreement." It does not say that the local agency shall disclose for the very first time the agreement, but that it shall "identify" the agreement, which in fact presumes that it is already familiar to the public. This could be a close issue in some cases because it could either be true or it could be falsely claimed that each time the local agency considered the matter, a final approval was pending. In this case, however, that argument is disingenuous. Council Member Dona Spring declared that prior to May of 2005 the City Council was never given written information but only oral reports regarding the terms of the proposed settlement. (See page 55.) Those oral reports over many months could not have been the subject of a final approval.

The Opinion of the Attorney General relied on by the Trial Court does not address any of the distinctions made in the Motion and is concerned only with the right to keep legal analysis private. It therefore had no bearing on the Motion.

Finally, the Trial Court asserted that there was no admissible evidence of fraud. First of all, the Trial Court never ruled that any of our evidence was inadmissible, nor did the parties object to any of it, except the First Declaration of Dona Spring. That objection was overruled by the Trial Court in the last paragraph of its Ruling on the Motion. Two pieces of essential evidence were submitted with the Motion, namely Exhibit 3 and Exhibit 4. The *former*, which is now Appendix I, consists of directions to access an official tape recording on the City's website of the City Attorney's public explanation on May 17, 2005 of the reason for the Confidentiality Agreement. The *latter* consists of seven official Agendas of closed session meetings of the Berkeley City Council, ranging from January 10, 2005 to May 24, 2005, wherein notice was given that the underlying case would be discussed. The *former* is what triggered Petitioner's Motion, because it exposed the City Attorney's diametrically false claim that the contents of settlement negotiations could prejudice the City in the litigation. From the *latter* it follows as a matter of logical inference that at those noticed meetings the settlement negotiations were discussed. At least part of that discussion must have been about the facts of what occurred at the settlement negotiations. It then followsas a matter of logical deduction that the Brown Act was violated and an extrinsic fraud was committed, because the discussion involving the mere facts of what occurred at the settlement negotiations, including any settlement offers that were presented by either side, could not as a matter of law prejudice the public agency in the litigation and were therefore required to be held in public open session meetings. The complete argument of why this is so according to the statuteswas presented on page 18, supra.

The City of Berkeley's Opposition, on page 4, says: "Mr. Mutnick objects to a confidentiality agreement ... because in his view it violates some unidentified provision of the Brown Act." And, on page 5: "Thus, the idea that the Brown Act requires public disclosure of preliminary or draft litigation settlement proposals is the premise of Mr. Mutnick's entire argument. It is an incorrect premise. ... To state the obvious, the Brown Act regulates meetings, not documents."

To refute this and make clear our argument, Berkeley City Council Member Dona Spring documented in her Second Declaration attached to our Reply the fact that mere reports were made **at the meetings** of what had transpired and what had been proposed. (See Appendix K.) This was not legal analysis, but mere reporting. Between the time of filing the Motion and the Reply, the Confidentiality Agreement itself became available, and we introduced that into evidence as well, with the best Declaration we could obtain from Matthew Artz, an investigative reporter who had covered the story of its release. "The moving party may file reply papers (additional declarations or points and authorities in reply to the opposition papers)...." (Weil & Brown, Cal. Practice Guide (2005) Civ. Proc. Before Trial, §9:106, ch. 9(I), p. 68.) Alameda County Local Rule 5.4 requires specific written objection to evidence to be made "no later than 4:30 p.m. on the court day preceding the hearing." ***None was ever made and so all of the necessary evidence was undisputed!***

7. The State Appellate Process

The Court of Appeal and the Supreme Court issued summary denials of our Writs challenging the Ruling of the Trial Court. In the Supreme Court, we felt forced to focus on the "ruling on the merits," because the Trial Court had improperly issued it and the jurisdictional issue would likely be deemed moot and of no interest to the Supreme Court in a matter that was made to seem as though it had no merit.

REASONS FOR GRANTING THE WRIT

Our argument vis-à-vis the Brown Act was admittedly original, but it is undeniably true based on the plain word meaning of the statutes we invoked and a recent amendment to the California Constitution. Our minimal federal claim is that the City of Berkeley and then the Trial Court deprived us of important First Amendment rights, with only untenable misconstructions of state law as their excuse, in violation of the Due Process Clause of the Fourteenth Amendment. It was clear at every stage, from the facts of the case, that an unfavorable response to our argument on the Brown Act would negate rights of speech, press, assembly, and petition.

The question must be asked, "Why did the Trial Court go to such elaborate lengths of blatant misconstruction to deny this Motion?" The answer can only be because the Trial Court wanted to slam the door on any possible review of the substantive issue that it raised. It wanted to create an aura of invalidity around an argument that was obviously valid so as to obscure the truth of it. "Oh what a tangled web we weave, When first we practice to deceive!" (Sir Walter Scott, 1808.) The Trial Court knew how to accomplish its mission and did accomplish its mission. The appellate courts looked with disdain upon our Petitions and summarily denied them.

Is this a small or insignificant matter? This matter strongly affects the rights and destinies of over 100,000 residents of the City of Berkeley. How could the appellate courts lend a deaf ear to such a blatant injustice that affected so many? Perhaps they were afraid to enforce such simple laws, when the enforcement would have such far-reaching consequences in the real world. But what in God's name are our laws and Constitutions for if they are rendered of no effect in the face of large "political" problems that affect many people? Do we strain at the gnat and swallow the camel?

In *Vachon v. New Hampshire,* 414 U.S. 478 (1974), the reason for the Court's intervention in a matter of state law was not so clear, and that deeply troubled Justice Rehnquist, who dissented. This matter however is not about a button. It is about the most important local issue that will face over 100,000 residents of the City of Berkeley for the next fifteen years. It is about blatant disregard on the part of state courts for the will of the Legislature and the will of the People of the State of California. If this Court cannot find a dozen good reasons to intervene in this matter, then it has conceded that there is no Rule of Law in America.

This matter implicates four of the five rights enumerated in the First Amendment, which should invoke the heightened scrutiny of the Court and enable the Court to address this matter to the fullest extent that the Court might desire. We aim in bringing this matter before the Court to take Justice Thomas up on his open invitation in *Saenz v. Roe,* 526 U.S. 489, 527 (1999): "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case." This is that appropriate case. Here all kinds of inalienable rights have been trampled upon, and if the Privileges or Immunities Clause has a more profound meaning, it is that state action of that kind will *not* be tolerated. When state forces collide over an inalienable right, The United States has a dog in that fight!

CONCLUSION

For all these reasons, the Petition should be granted.

Respectfully submitted,
Peter J. Mutnick,
January 3, 2006.

APPENDIX A

Kenyon, Michelle Marchetta
1999 Harrison Street
Suite 1300
Oakland, CA 94612

Sanger & Olson, a Law Corporation
Attn: Olson, Charles R.
One Embarcadero Center, Suite 1200
San Francisco, CA 94111

Superior Court of California, County of Alameda
Hayward Hall of Justice

City of Berkeley Plaintiff/Petitioner(s)	No. RG05199505
vs.	Order
University of California, Berkeley Defendant, Respondents(s) (Abbreviated Title)	Motion Denied

The Motion filed for Peter J. Mutnick and others was set for hearing on 07/20/2005 at 9:00 AM in Department 512 before the Honorable Bonnie Lewman Sabraw. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion of non-party Peter J. Mutnick ("Moving Party") For Inquiry Into the Existence of Extrinsic Fraud In the Obtaining of The Voluntary Dismissal In This Case is DENIED. The reasons follow.

First, the Court notes that it does have the jurisdiction to make such an inquiry, even at the request of a non-party, as part of a determination on a motion to vacate a judgment,

brought pursuant to the Court's inherent power to vacate a judgment obtained through extrinsic fraud. (See, e.g., Gardner v. Trevaskis (1958) 158 Cal. App. 2d 410, 413-414. However, no such motion to vacate has been made in this instance, and so the Motion for Inquiry is DENIED.

Moreover, even if the Court were to treat the instant motion as a Motion to Vacate Judgment, the Motion would be DENIED on the grounds that the Moving Party has not shown that the dismissal in this case was obtained by extrinsic fraud. The Moving Party has not presented admissible evidence that he was fraudulently deprived of an opportunity to present his claim or defense to the court, fraudulently kept in ignorance of the lawsuit or of the existence of on-going settlement discussion, or in some other manner fraudulently prevented from fully participating in the court proceeding. Based on the evidence submitted by Moving Party, he could have moved to intervene in the underlying action, or could have filed a similar action of his own challenging the action by Respondent University of California, as soon as the litigation began. There is no evidence that his decision to not so participate was in any way based on fraudulent actions of either Petitioner City of Berkeley ("City") or Respondents. The Brown Act permits the City to handle litigation, including the settlement of litigation, in closed session (see Government Code §§54956.9 and 54957.1; see also 75 Op. Atty. Genl. 14 (1992)), so the City's decision to do so here does not constitute "fraud".

The request of the City to strike the Declaration of Councilmember Dona Spring In Support of Motion for Inquiry, contained in City's opposition papers is DENIED.

Dated: 07/21/2005 s/ "Bonnie Lewman Sabraw"
Judge Bonnie Lewman Sabraw

APPENDIX B

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

PETER J. MUTNICK,
Petitioner,
v.
THE SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent;
CITY OF BERKELEY, ET AL.,
Real Parties in Interest.

A111061
Alameda County No. RG05199505

FILED
COURT OF APPEAL FIRST APPELLATE DISTRICT
AUG 24 2005
BY DIANA HERBERT, CLERK DEPUTY CLERK

BY THE COURT:

The petition for writs of mandate and certiorari is denied.

The justices participating in this matter were:

X Marchiano, P.J. _Stein, J. X Swager, J. X Margulies, J.

Date: AUG 24

MARCHIANO, P. J. P.J.

APPENDIX C

Court of Appeal, First Appellate District, Division One – No. A111061
S136921

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PETER J. MUTNICK, Petitioner,

v.

SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent;

CITY OF BERKELEY, et al., Real Parties in Interest.

Petition for review DENIED.

SUPREME COURT
FILED
OCT 12 2005
Frederick K. Ohlrich, Clerk
DEPUTY

GEORGE

Chief Justice

APPENDIX D

Kenyon, Michelle Marchetta
1901 Harrison Street
9th Floor
Oakland, CA 94612

Sanger & Olson, a Law Corporation
Attn: Olson, Charles R.
One Embarcadero Center, Suite 1200
San Francisco, CA 94111

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

City of Berkeley Plaintiff/Petitioner(s) vs. University of California, Berkeley Defendant, Respondents(s) (Abbreviated Title)	No. RG05199505 Application Re: Other Exparte Denied

IT IS ORDERED that the Ex Parte Application of Proposed Intervenor Carl Friberg ("Mr. Friberg") is DENIED. This action was dismissed in its entirety with prejudice on May 26, 2005, precluding intervention by Mr. Friberg. (See, e.g., O'Dell v. Freightliner Corp. (1992) 10 Cal.App.4th 645.)

Dated: 05/27/2005

s/ "James A. Richman"
Judge James A. Richman

APPENDIX E

(Page 10 of Petitioner's Memorandum of Points and Authorities in Support of Motion For Inquiry, in the Trial Court)

Some people are rather cynical about politics in America. However, it is written into our laws that we live in a participatory democracy, where the people do not just vote and then give their representatives *carte blanche* to do as they please, but on the contrary retain control over their elected representatives, who are to serve as delegates enacting the will of the people and not as surrogates substituting their own will for the will of the people. The actual wording of the preamble to Brown Act is really quite remarkable, and its "substantive" provisions are consistent with this expressed intent:

> 54950. In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The information the people are entitled to is for the purpose of retaining control over their elected representatives and

compelling them to truly represent the people. The representatives of the people are not to conduct themselves autocratically, for that is the death of democratic institutions. A fraudulent act that excludes the people from "the people's business" is perhaps the most odious form of extrinsic fraud imaginable. So, the conclusion is that under the Brown Act, which governs such matters, the City officials were required to inform the people of the settlement offers that were on the table, and moreover they were required to represent the people in executing the will of people concerning those settlement offers, whether to accept them or not. This was not a choice that they could make autocratically, but they were required to act as representatives of the people in enacting the will of the people. That was not done in this case, and so what was done must be undone and done again, this time with respect for the living reality of democracy. This settlement agreement pertains to a long-range plan. Many believe that what has been agreed to is a complete and utter disaster for the City of Berkeley, a complete sell-out of the interests of the people of Berkeley, giving all and getting nothing in return. Now, how can a handful of politicians presume to commit the entire City of Berkeley, present and future, to such a long-range plan without even receiving the informed consent of the public on the matter? It is beyond comprehension how anyone could act so autocratically in this day and age. It shows a disregard for the law and the rule of law and the very essence of democracy.

APPENDIX F

(From Page 11 of Petitioner's Petition For Writs of Mandate and Certiorari or Other Extraordinary Relief, in the Court of Appeal)

(Note: Petitioner Filed a Notice of Intent To Rely On Court of Appeal Brief with the California Supreme Court and also resubmitted the same Petition, so this same matter was pressed again in the Supreme Court.)

11. The Respondent Court could not have ruled upon our legal rights in this matter, because the Respondent Court did not even acknowledge those rights, but we did prove the violation of those rights by clear and convincing evidence. We proved by undisputed evidence the existence of extrinsic fraud in the obtaining of the settlement agreement and voluntary dismissal in the underlying Case. Our proof did not even depend upon our right of intervention, because we were first of all defrauded out of participation in the settlement process. We had a legal right to know what settlement offers were being considered so that we could exercise our right to participate in a participatory democracy. That right is granted to us by the Brown Act, but is ultimately a Constitutional right and a natural right.

PRAYER

Petitioner prays for a Writ of Certiorari to annul the Respondent Court's application of inapposite law and its refusal to apply apposite law to the matter before it. Furthermore, Petitioner prays for a Writ of Mandate to command the Respondent Court to assume jurisdiction in this matter and to exercise its discretion in the only way that it can be exercised when the proper law is properly applied to the undisputed evidence in this matter.

APPENDIX G

CONFIDENTIAL FOR SETTLEMENT PURPOSES ONLY

CONFIDENTIALITY AGREEMENT REGARDING SETTLEMENT DISCUSSIONS

This Confidentiality Agreement Regarding Settlement Discussions between the City of Berkeley ("City") and the Regents of the University of California ("The Regents") (collectively the "Parties") is entered into as of *April 22*, 2005 (the "Effective Date").

WHEREAS, the Parties desire to enter into settlement negotiations regarding that certain litigation entitled City of Berkeley v. University of California, Alameda County Superior Court No. RG05199505; (the "Litigation");

WHEREAS, the Parties desire a candid exchange of information to facilitate the full and frank discussion and exchange of information surrounding the Litigation and its possible resolutions;

WHEREAS, negotiations will be undertaken for purposes of settlement and, (sic) compromise only, and any discussions had in this context may not accurately reflect the Parties' positions during an adversarial proceeding;

NOW THEREFORE the Parties agree as follows:

1. Information Disclosed During Negotiations Not Admissible. Consistent with, and in addition to, California Evidence Code §1152, the Parties hereby agree that the fact that either party may have made or may at any time make any offers to compromise or resolve the Litigation shall not be

admissible in evidence or discussed, mentioned, or argued in front of any jury or fact finder at any phase of any trial or alternative dispute resolution proceeding at which the Litigation is directly at issue. The Parties agree that any discussions held or documents disclosed between the Parties related to this litigation shall be confidential to fullest extent of the law as envisioned by California Evidence Code Sections 1115, et seq., 1152, and related sections.

2. Maintain Confidentiality Outside of Settlement Discussions. Both Parties hereby agree that they will not disclose any of the information or documents exchanged during settlement negotiations outside the context of settlement of this Litigation. The Parties agree that to the extent allowed by law, the information discussed or exchanged during settlement discussions will not be disclosed publicly. In addition, Parties agree that this Agreement binds all employees, agents and representatives of the Parties who learn of or obtain information or documents related to the settlement discussions, regardless of whether such employees, agents or representatives participated in the settlement discussions.

4. (sic) Amendment. This Agreement may not be modified or amended except by a writing executed by both Parties.

5. Entire Agreement. This Agreement is the entire agreement between the Parties regarding its subject matter. This Agreement supersedes all prior proposals, agreements, or other communications between the Parties, oral or written, regarding such subject matter.

6. Severability. If any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, then such unenforceability or invalidity shall not render this Agreement

unenforceable or invalid as a whole, and, in such event, such provisions shall be changed and interpreted so as to best accomplish the objectives of such provisions within the limits of applicable law or applicable court decisions.

7. Waiver. The failure of either Party to require performance by the other Party of any provision hereof shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either Party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

The signatories below acknowledge that they are duly authorized to enter into this Agreement and that they have read and agree to all of the terms and conditions of this Agreement.

City of Berkeley
By: s/ *"Michelle Marchetta Kenyon"*
Its: *Counsel*
Dated: *4/22/05*

University of California, Berkeley
By: s/ "Incognizable signature"
Its: ASSISTANT VICE CHANCELLOR
Dated: 4·22·05

Regents of the University of California
By: s/ *"Hope Schmeltzer"*
Its: *University Counsel*
Dated: *4/22/05*

APPENDIX H

(Page 7 of Petitioner's Memorandum of Points and Authorities in Support of Motion For Inquiry, in the Trial Court)

The proof of the existence, nature, and purpose of the confidentiality agreement (which are otherwise somewhat elusive to proof, due to the whole insidious nature of such a policy of secrecy) is contained in a video segment that records a portion of the May 17, 2005 meeting of the Berkeley City Council. That segment records a public comment session just before a closed session meeting, one week before the Council approved the settlement agreement. Right after the public comment session, there was a public discussion between Councilmember Worthington, Mayor Bates, and the City Attorney. The critical portions of this exchange are the following (see Exhibit 3):

> Councilmember Worthington:
> ... Does the City Council have the power by a vote to release to the public what is proposed, either the University's proposal or the City's proposal?
>
> City Attorney Manuela Albuquerque:
> No, it does not. It is protected and prohibited by the confidentiality agreement, which governs our settlement negotiations.
>
> Mayor Bates:
> ... Could you explain to me what the situation is here?
>
> City Attorney Manuela Albuquerque:
> The confidentiality agreement was actually signed at the City's request, because the City has in the past had situations where during the pendency of a

lawsuit comments are made or settlement discussions occur and then those discussions and comments are used in the litigation against the City. I already observed that some of the discussions that took place between the Mayor and the Chancellor prior to the lawsuit were being quoted by the University in the press, and I feared would appear in opposition papers in our lawsuit. So, for that reason we wanted to ensure that all discussions would be completely confidential and the City could speak freely and the University could speak freely, without it coming back to haunt them in the litigation. So, the University and we entered into a confidentiality agreement, which prohibited any discussion.

Mayor Bates:
... Would we be in contempt of court?

City Attorney Manuela Albuquerque:
Well, it would be a breach of the agreement.

Councilmember Worthington:
Did the City Council vote on this agreement?

City Attorney Manuela Albuquerque:
No, but we discussed it in closed session.

Councilmember Worthington went on to catch the City Attorney in one of her own mistakes – she had revealed what went on in a closed session, in violation of the Brown Act. The question of whether there was any authorization at all for the "confidentiality agreement" needs to become a subject of inquiry.

APPENDIX I

INSTRUCTIONS FOR INTERNET ACCESS TO VIDEO RECORDINGS

I. CRITICAL QUESTIONS PUT TO THE CITY ATTORNEY BY COUNCILMEMBER WORTHINGTON AND MAYOR BATES

1. Go to City of Berkeley's website at http://www.ci.berkeley.ca.us/
2. Click on "City Council" at the top of the page
3. Click on "2005" under "Council Meetings"
4. Click on "Video" for "Special Closed" Meeting on "05/17/05"
5. Click on "Jump To" and go to "Public Discussion"

(You must have Windows Media Player 9 to view the video, but if you don't have it, it can be easily downloaded from the link that the City provides.)

II. ADMONITION OF PETER J. MUTNICK TO THE CITY COUNCIL DURING PUBLIC COMMENT SESSION JUST BEFORE THE CITY COUNCIL APPROVED THE SETTLEMENT AGREEMENT

1. Go to City of Berkeley's website at http://www.ci.berkeley.ca.us/
2. Click on "City Council" at the top of the page
3. Click on "2005" under "Council Meetings"
4. Click on "Video" for "Special Closed" Meeting on "05/24/05"
5. Click on "Jump To" and go to "Public Comment – Speaker 9"

Note: All of the Speakers (1-10) voice pubic concerns relevant to this motion.

(You must have Windows Media Player 9 to view the video, but if you don't have it, it can be easily downloaded from the link that the City provides.)

III. PUBLIC COMMENTS OF OUTRAGED MEMBERS OF THE PUBLIC AT THE FIRST CITY COUNCIL MEETING AFTER THE DASTARDLY DEED HAD BEEN DONE

1. Go to City of Berkeley's website at http://www.ci.berkeley.ca.us/
2. Click on "City Council" at the top of the page
3. Click on "2005" under "Council Meetings"
4. Click on "Video" for "Regular" Meeting on "06/14/05"
5. Click on "Jump To" and go to "Public Comment – Speaker 1 through 7"

(You must have Windows Media Player 9 to view the video, but if you don't have it, it can be easily downloaded from the link that the City provides.)

APPENDIX J

INSTRUCTIONS FOR INTERNET ACCESS TO ALL DOCUMENTS FILED IN THE SUPERIOR COURT CASE

Please follow these steps in succession:

1. Go to Superior Court's website at:
   http://www.alameda.courts.ca.gov/courts/

2. Click on:
   DomainWeb: Access to General Civil, Family Law, and Probate Cases

3. Click on:
   Case Summary

4. Enter the case number: RG05199505. Click on: Submit.

5. To see all documents filed in the case, click on:
   Register of Actions (in the left margin)

6. To see a particular document: click on the page icon (in the right margin)

(It may be necessary to download some Java software, which should happen automatically.)

If there are any problems, contact the Executive Officer, Arthur Sims, at:

Phone: 510-208-3966 Fax: 510-271-5130

APPENDIX K

First Declaration of Councilmember Dona Spring

I am writing this declaratory statement regarding my concerns over several potential, serious, illegalities with the settlement agreement on UC's Long Range Development Plan 2020 signed by the Berkeley City Council majority and the UC administration in May 25, 2005. I believe this agreement, if allowed to stand, will set a very dangerous precedent for not only for the chartered City of Berkeley but all other cities in California. Municipal powers cannot be given or bartered away. This agreement is a gross violation of the City of Berkeley Charter and should be investigated.

1. Was the Brown act violated by keeping this agreement from the public -- giving them no opportunity to comment or intercede legally particularly since this agreement dealt with land-use development standards normally the purview of ordinances?

2. Insufficient grounds were given by the Berkeley City Attorney for the confidentiality agreement. The City Attorney never revealed to the Council until a week before the final vote that she had approved a confidentiality agreement that would preclude the Council from ever sharing the negotiated settlement with the public before a final vote on it. The Council voted to ask UC to let it out of the confidentiality agreement, but UC declined. The confidentiality agreement precluding the Council from making the agreement public before the final vote was never even discussed by the City Council, much less voted upon. To the best of my recollection, no vote was even taken with regard to the confidentiality agreement, which the City Attorney told Council was needed to preclude the University from using statements made during mediation against the city if it went to trial.

3. The agreement as it stands violates state law and the City of Berkeley Charter.

4. The agreement violates CEQA law by allowing UC to veto findings and mitigations in a document that is supposed to make impartial study of impacts on the environment and ways to mitigate those impacts.

I am attaching the following notes regarding the violation of the Charter and state law, along with references to the LRDP agreement as well as references to the City of Berkeley Charter.

Background: on May 24, 2005 the Council majority voted to approve a settlement agreement on the UC 2020 Long Range Development Plan, which seem to be in conflict with State law and the city charter.

Questions have arisen about Section II.B.:

1. II.B.3.&4.
State law requires that the Planning Commission takes the lead on all city projects.

2. II.B.6.&7.
The General plan, area plans and zoning changes are made by ordinances. The city charter gives the power to enact resolutions and ordinances to five votes of the City Council. While this City Council can probably not even agree to abrogate its own vote on land use planning and zoning to the UC Regents, it is prohibited by the charter from abrogating future Council majorities' votes to another entity. (The LRDP agreement would supersede Council majorities' votes on downtown development standards for at least 15 years.) The settlement agreement does abrogate future Council's power to pass ordinances governing development standards

in the expanded downtown area to UC. UC may block what a Council majority wants or does not want. The DAP is not scheduled to be finished for four years by that time a whole new Council will be elected and the charter does not allow other entities to make these decisions other than the Council majority. Does this violate State law as well as the charter?

3. How does the agreement conflict with the Charter's provision for citizen referendums on ordinances? Should not the Sections II.B. that are pertaining to the downtown area plan, General plan, the development standards as well and zoning be the proper subject of an ordinance instead of a closed door negotiation with no recourse for the citizens to referendum this land use giveaway?

4. Are there any precedents in the State of California where zoning powers and ability to set General plans and area plans are abrogated by City Councils to other entities? Does not State law require that legislative bodies such as City Councils and County Supervisors must have the power to enact General plans and area plans as well as zoning?

5. Under this precedent, what could stop future Council majorities from abrogating the entire General plan and zoning of Berkeley or other parts of it to UC or another entity or corporation?

Subsection II.B. of the Settlement Agreement:

B . DAP / EIR Process.

1. The City will act as the Lead Agency under CEQA for preparation of the Downtown Area Plan (the "DAP") and DAP EIR. The Regents will reserve their autonomy from local land use regulation.
2. The City will certify the EIR and adopt the DAP within 48 months of executing the Settlement Agreement; however the City Manager and

Chancellor may agree to extensions of this deadline without further approval by The Regents or the City Council.

3. There shall be a staff level DAP joint preparation committee that includes UC Berkeley planners. The City and UC Berkeley staff will meet and establish "milestones" for the planning process to ensure orderly and timely completion of the Plan and EIR within the 48 month period. The parties may agree on incentives and/or disincentives beyond those specified herein to ensure that the process is completed in a timely and effective manner.
    (a) If the goal of completion within 48 months is not met as a result of City action or inaction not caused by UC Berkeley's failure to perform under this Agreement, then UC Berkeley's annual payment to the City will be reduced by $180,000 each year or $15,000 per month of delay, until certification of the EIR and adoption of the Plan. This reduction in annual payment, if it occurs, may not be drawn from the TDM or Neighborhood funds (see part III.B, below).
    (b) UC Berkeley retains the right to tier from the 2020 LRDP EIR as provided in part II.A.5 and II.A.6 above.
4. Dispute Resolution: The City's planning director and the campus' planning director will be fully authorized to make process decisions jointly. If the City planning director and campus planning director cannot resolve a dispute, it will be referred to the City Manager and UC Vice Chancellor for Facilities Services for resolution. If they cannot resolve the dispute, it will be referred to the Mayor and the Chancellor. If they cannot resolve the dispute, the parties would equally share the costs of the outside mediation.

5. All public meetings regarding the DAP and EIR, excluding any public hearing process before City commissions and the City Council must be jointly planned and sponsored by the City and UC Berkeley. All DAP and EIR meetings before all City commissions and the City Council will be coordinated with UC Berkeley.
6. Joint review of DAP and EIR: because the DAP is a Joint Plan, there shall be no release of draft or final DAP or EIR without concurrence by both parties. Concurrence may be withheld in the case of a good faith disagreement regarding Land planning or CEQA issues. Any mitigation measures included in the EIR must be acceptable to UC Berkeley and applicable to all projects in the Downtown Area, regardless of ownership or sponsorship. Each party reserves the right to determine the feasibility of mitigation measures proposed in the DAP EIR and to discuss such feasibility in the DAP EIR, other environmental documents or findings.
7. UC Berkeley reserves the right to determine if the DAP or EIR meets the Regents' needs. The basis for making such a determination would be that the DAP or EIR does not accommodate UC Berkeley development in a manner satisfactory to the Regents.
8. If the DAP EIR is challenged in court, the University may tier solely from its 2020 LRDP EIR unless and until the DAP EIR is upheld. The university will not be required to defend the DAP EIR in Court.

SECTIONS OF THE CITY CHARTER THAT ARE VIOLATED BY THE LRDP [AGREEMENT]:

ARTICLE VIII. THE COUNCIL

Section 38. The Council, the governing body.

The Council shall be the governing body of the municipality. It shall exercise the corporate powers of the City, and, subject to the express limitations of this Charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the Constitution of the State.

Section 44. Ordinances, resolutions and motions.

(1) Action by Council.

The Council may act by ordinance, resolution or motion.

(2) Ayes and noes.

The ayes and noes shall be taken upon the passage of all ordinances, resolutions and motions and entered upon the journal of the proceedings of the Council.

(3) Majority vote of Council.

No ordinance, resolution or motion shall be passed or become effective without receiving the affirmative votes of at least five members of the Council.

(6) Requirements of an ordinance.

To constitute an ordinance a bill must before final action thereon be publicized as provided in Article III Section 5(2) with the ayes and noes for two days, and, in case of any amendment being made thereto before the final adoption of the ordinance, must in like manner be republicized as amended for not less than one day.

(11) Repeal.

No ordinance nor section thereof shall be repealed except by ordinance adopted in the manner provided in this section.

ARTICLE XVI. MISCELLANEOUS

Section 113. Conduct of legal proceedings.

The City Attorney shall prosecute, in behalf of the people, all criminal cases arising from violations of the provisions of this Charter and the ordinances of the City, and shall attend to all suits and proceedings in which the City may be legally

interested; provided, the Council shall have control of all litigation of the City and may employ other attorneys to take charge of any litigation or to assist the City Attorney therein.

Section 114. Violation of Charter and ordinances.
The violation of any provision of this Charter or of any ordinance of the City may be deemed a misdemeanor, and may be prosecuted by the authorities of the City in the name of the people of the State of California, or may be redressed by civil action, at the option of said authorities. Any person sentenced to imprisonment for the violation of a provision of this Charter or of an ordinance may be imprisoned in the City jail, or, if the Council by ordinance shall so prescribe, in the county jail of the county in which the City of Berkeley is situated, in which case the expense of such imprisonment shall be a charge in favor of such county against the City of Berkeley.

Section 115. Municipal affairs.
The City of Berkeley shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter; provided, however, that nothing herein shall be construed to prevent or restrict the City from exercising or consenting to, and the City is hereby authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted or prescribed by general laws of the State.

Section 118. Additional powers.
The City Council shall have the power to enact appropriate legislation and do and perform any and all other acts and things which may be necessary and proper to carry out any of the powers of the City or any of the provisions of this Charter, and to exercise all powers not in conflict with the Constitution of the State, with this Charter or with ordinances adopted by the people of the City.

I declare under penalty of perjury that the foregoing is true and correct.
DATE: June 20, 2005
PLACE: Berkeley, California

s/ "Dona Spring"
Dona Spring, Councilmember
of the City of Berkeley

Second Declaration of Councilmember Dona Spring

Council Member Dona Spring
2180 Milvia St. 5th Floor
Berkeley, CA 94704
July 11, 2005

I am adding to my previous statement some additional concerns I have regarding the handling of the LRDP settlement agreement and also responding to City Attorney Zack Cowan's unsubstantiated allegation that I have "purported to disclose privileged discussions that took place in properly noted closed sessions." I challenge anyone to find any so-called "privileged discussions" in my declaratory statement. Disclosing whether matters that are now public were voted on or not in executive session is not revealing "privileged discussions." I have commented only on the process, not the privileged information itself. Of course Mr. Cowan would want stricken anything that calls into question the propriety of his acts or those of others who advised the City Council on this matter.

Even if I had disclosed privileged information, which I did not, I have an obligation to citizens and a right under the Brown Act to ask for review of matters by the proper parties that I suspect may not have been or be legal.

I cite the Brown Act:

(e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:

(1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation Act: a closed session if that action were to be taken by a legislative body of a local agency.

(2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

(3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

It is my belief that there were improprieties conducted in what City Council members were told about the agreement and when they were told it. To the best of my recollection: **The City Council was never given any written information regarding the settlement offers until its first executive session in May of 2005. Prior to that time it was given oral reports regarding the terms of the proposed settlement with the University by both the City Attorney and the Mayor.** At the first meeting in May when the written document was distributed at the beginning of the executive meeting, and it was taken away by the end of the executive meeting. The document was being discussed before Council members even had a chance to read the document. The same thing happened at the subsequent executive session in that the document was passed out at the beginning of the meeting and then retrieved at the end of the meeting, leaving no Council members a chance to study the documents uninterrupted. One Council member insisted on keeping the documents and I asked that the documents be faxed to me since I was teleconferencing from my home and had not even been able to look at them. I still have these earlier documents. At the final executive session when the

vote was taken, the final document was again available just prior to the Council meeting.

After the negotiations, and the parties signed the final agreement, I requested from the City Attorney an electronic copy of the settlement agreement and she said that except for a final scanned document from the University none existed. I asked her for an earlier draft and she said all had been purged.

I strongly believe that if City Attorney's office had not unilaterally signed a confidentiality agreement with the University of California, precluding the Berkeley City Council from making the agreement public before the final vote, the agreement in its current form would've never survived the sunshine of public scrutiny and outrage. Signing away municipal powers over zoning for 15 years (as the agreement does) is a serious violation of state law and City of Berkeley's Charter. This would've been very unlikely to happen had the concerned public had a chance to weigh in on the gravity of this matter. It is not too late to set aside this misbegotten and illegal agreement so that the public can have their day in court and, most importantly, the powers granted to the residents of Berkeley by their Charter can be restored.

I declare this of my own personal knowledge, except as to those things that are stated on information and belief, and as to those things I believe them to be true.
If called as a witness, I will be able to testify to all of the above.
I declare under penalty of perjury that the foregoing is true and correct.

DATE: July 11, 2005
PLACE: Berkeley, California

s/ "Dona Spring"
Dona Spring, Councilmember
of the City of Berkeley

No. 05-860

Supreme Court, U.S.
FILED
FEB 1 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PETER J. MUTNICK,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District, Division One

BRIEF IN OPPOSITION

MANUELA ALBUQUERQUE,
City Attorney (SBN 67464)
ZACH COWAN,
Assistant City Attorney
(SBN 96372)
Counsel of Record
2180 Milvia Street, 4th Floor
Berkeley, CA 94704
510.981.6950

Counsel for Respondent City of Berkeley

JAMES E. HOLST (SBN 34654)
UNIVERSITY OF CALIFORNIA
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
510.987.9800

Counsel for Respondent The Regents of the University of California

COCKLE LAW BRIEF PRINTING CO (800) 225-6964

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I

INTRODUCTION

Pursuant to Rule 15, Respondents City of Berkeley ("City") and The Regents of the University of California ("The Regents" or "University") file this answer to the petition for writ of certiorari ("Pet.") by Peter J. Mutnick[1] ("Mutnick"). The Petition simply does not meet the threshold requirements for invoking this Court's jurisdiction on certiorari, and Mutnick has failed to advance any intelligible argument in support of it.

II

STATEMENT OF THE CASE

The City of Berkeley filed a lawsuit against the University of California, challenging the University's approval of a Long Range Development Plan for its Berkeley Campus. The parties reached a settlement of that litigation, and it was subsequently dismissed.

Mutnick did not intervene in the lawsuit while it was pending, but waited until a month after it had been dismissed to challenge the settlement. His challenge was rejected on its merits by the Alameda County Superior Court, and this decision was upheld by both the California Court of Appeal and Supreme Court.

Specifically, in January 2005, The Regents certified the Environmental Impact Report (EIR) the University

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[1] Mutnick purports to bring this case on behalf of "others". He may not do so. Mutnick is not a member of the bar and therefore may only represent himself. Moreover, no "others" have ever been identified or appeared as parties.

had prepared for its 2020 Long Range Development Plan (2020 LRDP) for the Berkeley Campus, as required by state law.

In February 2005, the City of Berkeley sued The Regents under the California Environmental Quality Act (CEQA), alleging that the EIR was inadequate.

Ultimately, after several weeks of confidential settlement negotiations, the parties agreed to a settlement of the litigation. On May 24, 2005, at a properly noticed special meeting, the Berkeley City Council approved the settlement by a vote of 6-3 in closed session. The Regents approved the settlement agreement the following day. On the same day, as soon as it was possible to do so, the City Clerk posted the executed settlement agreement on the City's website and made it available to the public. The case was dismissed on May 26, 2005.

On May 27, 2005, the Alameda County Superior Court denied an intervention motion by Carl Friberg, Anne Wagley and Kriss Worthington (a City Council member who did not support the settlement) on the ground that the case had already been dismissed.

A month later, on June 27, 2005, Mutnick filed a "motion for inquiry" with the Alameda County Superior Court, in which he asked the court to inquire into his allegations that the settlement involved extrinsic fraud.

The City and The Regents urged the court to reject this challenge on the ground that Mutnick, as a non-party who could have intervened but chose not to do so, was not entitled to file a motion for relief from default simply because he disagreed with the manner in which the case had been resolved.

The Superior Court rejected this argument, however. The Superior Court also overcame the procedural problem that a "motion for inquiry" was inappropriate, by treating it as a motion to vacate the judgment, since the case had already been dismissed. The Superior Court then considered the merits of the motion and denied it on the ground that Mutnick had shown no fraud or violation of law, and there was no basis for invalidating the settlement. (Pet. App. A.)

Mutnick unsuccessfully sought both a writ of mandate from the California Court of Appeal, and review by the California Supreme Court. He has now filed a Petition for Certiorari in this Court.

Mutnick complains that the Superior Court erred by reaching the merits of his claim under the rubric of a motion to vacate rather than "motion for inquiry", and that this somehow denied him due process. He also reiterates his argument on the merits, which is that the City and University were obliged to publicly disclose the settlement communications that passed between them during the settlement process, before approving the settlement.

III

THE PETITION FAILS TO MEET THE THRESHOLD REQUIREMENTS FOR SEEKING CERTIORARI: THE SUPERIOR COURT DID NOT DENY MUTNICK DUE PROCESS BY REACHING THE MERITS OF HIS ALLEGATIONS

Supreme Court Rule 10 provides that certiorari is entirely discretionary and will be granted only for "compelling reasons". The Rule enumerates the character of the

reasons that the Court will consider in evaluating a Petition for Writ of Certiorari. Mutnick tries to bring himself within the ambit of either subdivision (b) or (c), arguing that the California courts have denied him due process. However he cites no authority from any court in support of this argument.

While Mutnick poses the issue as one of due process, the underlying issue is simply his refusal to accept the law of the State of California as articulated by the state courts. To the extent he offers any relevant, intelligible argument, he attacks only the correctness of the state courts' rulings under state law. This fact alone is sufficient to compel denial of the Petition, as it does not involve any basis for review under Rule 10.

In an abundance of caution we will nevertheless explain why both the City of Berkeley and the state courts acted properly.

A. The City's decision to settle its litigation against the University

The gist of Mutnick's argument as to "fraud" is that the City and University did not publicly disclose various draft versions of the settlement agreement they ultimately approved.[2] In Mutnick's view, the City's and University's refusal to disclose the settlement agreement before it was

[2] To the extent Mutnick's Petition might be construed as alleging some other "fraud", it is without merit. The City was represented in its suit by both in-house and outside special counsel. The City Council was fully briefed on the proposed settlement before it voted to approve the settlement by a vote of 6-3. Indeed, the fact of a 6-3 vote in itself shows that that the nine members of the City Council had sufficient information to disagree about the merits of the settlement.

approved constituted "extrinsic fraud" because (with respect to the City) it violated the Brown Act. (Cal. Gov. Code §54950 *et seq.*) On the same ground, Mutnick also objects to a confidentiality agreement the City and University signed as a condition of settlement discussions.

Mutnick's belief that the Brown Act requires public disclosure of preliminary or draft litigation settlement proposals is incorrect, and he provides absolutely no authority for this proposition. Rather, the Brown Act expressly requires only the disclosure of *final* settlement agreements, and only *after* they are approved. (Cal. Gov. Code §54957.1(a)(3).) The City strictly complied with these requirements.[3]

B. The Superior Court's Ruling

When presented with Mutnick's motion for inquiry into extrinsic fraud, the Superior Court could have simply rejected on it on standing or procedural grounds, as the City and University urged. Rather than doing so it gave Mutnick the benefit of the doubt, treated his motion as a motion to vacate under *Gardner v. Trevaskis*, 158 Cal.App.2nd 410 (1958), and reached the merits.

Even if this leniency was error, it clearly was *not* prejudicial to Mutnick.

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[3] The state law that generally controls disclosure of documents held by public agencies is the California Public Records Act (Cal. Gov. Code §6250 *et seq.*), not the Brown Act. Yet the Public Records Act has an express exemption for records pertaining to pending litigation, such as draft litigation settlement agreements. (Cal. Gov. Code §6254(b).)

IV

CONCLUSION

Mutnick complains that the Superior Court reached the merits of his motion under the incorrect rubric, and erred on the merits in rejecting his challenge. His complaints do not present an issue necessitating or justifying this Court's intervention. For all the foregoing reasons, the City respectfully prays that this Court deny Mutnick's petition for a writ of certiorari.

Respectfully submitted,

MANUELA ALBUQUERQUE,
City Attorney
ZACH COWAN,
Assistant City Attorney
Counsel of Record
2180 Milvia Street, 4th Floor
Berkeley, CA 94704
(510) 981-6950

Counsel for Respondent
City of Berkeley

JAMES E. HOLST
UNIVERSITY OF CALIFORNIA
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
(510) 987-9800

Counsel for Respondent
The Regents of the
University of California

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IN THE

Supreme Court of the United States

PETER J. MUTNICK,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
ALAMEDA COUNTY, et al.,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District, Division One

REPLY TO BRIEF IN OPPOSITION

PETER J. MUTNICK,
Petitioner Pro Se
2227 Derby Street, Apt. 3
Berkeley, CA 94705
(510) 540-7401

WHAT THE OPPOSITION OF THE PARTIES REVEALS

The parties to the original and underlying lawsuit are both large public entities and state actors. They have now jointly reiterated their various arguments before the Supreme Court of the United States. Now the Court can see for itself what I and many others have been up against: Orwellian misstatements of fact and law that leave one puzzled and discouraged concerning the integrity of our democracy.

For starters, the Honorable Court need only actually read the Ruling of Superior Court (Appendix A of the Petition). Contrary to the bizarre claim of the parties, in which they persist, the Superior Court did not treat my Motion as a Motion to Vacate, but on the contrary DENIED it for lack of jurisdiction. It thereafter purported to rule on the merits in dicta, after it was *functus officio* to do so.

Their misreading of the Ruling is not a sincere dyslexia on the part of the parties – they have a motive for their twisted reasoning. They want to assert and have asserted that the matter is res judicata in another parallel case (RG05230715) now pending in Alameda County Superior Court. The matter cannot be res judicata unless there was a ruling on the merits, and so the parties have argued in the other case that there was such a ruling. What is so disturbing is that the parties are willing to lie boldfacedly in the attempt to create a legal myth that they expect everyone to believe. What is even more disturbing is that this strategy has been employed by the parties again and again with such great success, in this matter and many others, causing many to lose faith in our system of government altogether.

The parties assert there was no prejudice to me. The prejudice to me was that I could not seek redress on the merits, because the Motion was denied for lack of jurisdiction, and if I argued correctly against that lack of jurisdiction, an appellate court would be strongly inclined in a mere writ proceeding to regard my jurisdictional argument as moot, since the matter was without merit according to the strongly worded, but entirely incorrect, argument of the Superior Court. None of my arguments, which would demonstrate that incorrectness, however, would ever be considered. An appeal was never available, and I was confined to seeking a writ, which is always more discretionary than an appeal. Hence, it appears on the face of the record that the strategy of the Superior Court was intended precisely to prejudice me in the worst way possible, by foreclosing completely any possibility of a genuine redress of grievances. In short, the trial court was in league with the parties and similarly willing to lie and deceive to achieve its desired end, which is the political impermeability of the bureaucracy to its critics.

The parties continue to present their conveniently ignorant view of the law. They ignore my obviously correct argument that *Gardner v. Trevaskis,* 158 Cal.App.2d 410 (1958), the authority relied on by the trial court for its Ruling, applies only to judgments subject to appeal. A voluntary dismissal is not subject to an appeal, nor is it subject to a writ. The parties ignore my correct argument that this was already established as the law of the case in the previous ex parte motion by Carl Friberg, Anne Wagley, and Kriss Worthington, which they mention. On the merits, they completely ignore my argument on the Brown Act, when viewed correctly in the context of Evidence Code Sections 1152 and 1154. The parties completely ignore my correct argument that the settlement offers were presented at City Council

meetings, according to the undisputed evidence in the Motion, that were not by any stretch of the imagination meetings at which a final approval of a settlement offer was pending. Many of these reports were oral and prior to any written agreement. They could not conceivably have resulted in a final approval, and so they were not covered under California Government Code Section 54957.1(a)(3), which is the disingenuous argument of the parties.

The only argument of the parties that is not in its entirety an Orwellian distortion of the facts and the law is the following, on page 4 of their Opposition: "Mutnick tries to bring himself within the ambit of either subdivision (b) or (c), arguing that the California courts have denied him due process. However, he cites no authority from any court in support of this argument." The first sentence here is ambiguous. If the parties mean that I cited no authority for the proposition that a clearly untenable state court ruling is judiciable by the High Court, then that sentence is another lie, as well, for I do cite *Vachon v. New Hampshire*, 414 U.S. 478 (1974), on page 30 of my Petition. Granted, however, I cite it in passing, so let me take this opportunity to quote the key passage of the holding, at page 480:

> In these circumstances, the conviction must be reversed. "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Harris v. United States*, 404 U.S. 1232, 1233 (1871). (DOUGLAS, J., in chambers); *Thompson v. Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596 (1968); see also *Adderley v. Florida*, 385 U.S. 39, 44 (1966).

The situation in this matter is exactly parallel to the situation in *Vachon*. We may paraphrase it thusly:

> "It is beyond question, of course, that a clear deprivation of First Amendment rights based on a record lacking any relevant (or tenable) justification under state law for the deprivation violates due process."

Now, the alternative meaning of the previous quote from the Opposition Brief of the parties is that I cited no authorities in support of this proposition, as the Court did cite authorities in support of its proposition in *Vachon*, even though "it is beyond question, of course." It is beyond question because it appears on the face of the Fourteenth Amendment.

HOW WE MEET THE THRESHOLD REQUIREMENTS FOR CERTIORARI

Vachon v. New Hampshire, supra, is far from settled law, but it is precedent. Justice Rehnquist dissented in *Vachon,* although in a very reasoned way that invited further inquiry. There is a long string of cases related to *Vachon,* which, like *Vachon,* defer the task of deciding whether the "pressed or passed upon below rule" is jurisdictional or prudential. Similarly, there is a long history of concern about the demise of the Privileges or Immunities Clause of the Fourteenth Amendment under the weight of *Slaughter-House Cases,* 83 U.S. 36 (1873). This matter brings all these questions involving the comity afforded to state courts and state entities squarely before the Court. For instance, due to being a Pro Se litigant, I lacked the foresight to mention the First Amendment below, but the fundamental rights

of speech, press, assembly, and petition were implicit throughout all of the proceedings.

To my mind, there can hardly be a weightier constitutional question than whether the Court will allow the magnificent legal superstructure which it has fostered to be completely eroded and undermined by Orwellian misconstructions on the part of state actors below, at the grass roots level, where the rubber meets the road.

CONCLUSION

The arguments of the parties are blatantly false, so it is not the arguments themselves that create the vital controversy in this matter, but the fact that they are so false. This is a controversy between public entities who assert their right to be false and citizens who assert their right to be free from such tyranny.

In footnote 1 of their Opposition, the parties challenge my "purport to bring this case on behalf of 'others.'" Again, they falsify. Obviously, what I intended was simply that if we get past this first hurdle of establishing the fraud, which is my own unique task, and are thereafter allowed to seek intervention, then many others will desire to join the Motion for Intervention, and we will at that point seek a competent attorney.

Respectfully submitted,

PETER J. MUTNICK,
Petitioner Pro Se
2227 Derby Street, Apt. 3
Berkeley, CA 94705
(510) 540-7401